

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

AMO DEVELOPMENT, LLC,
AMO MANUFACTURING USA, LLC
and, AMO SALES AND SERVICE,
INC.,

Plaintiffs,

v.

ALCON VISION, LLC,
ALCON LABORATORIES, INC., and
ALCON RESEARCH, LLC,

Defendants.

ALCON INC., ALCON RESEARCH,
LLC, and ALCON VISION, LLC,

Defendants and
Counterclaim
Plaintiffs,

v.

AMO DEVELOPMENT, LLC,
AMO MANUFACTURING USA, LLC,
AMO SALES AND SERVICE, INC.
and JOHNSON & JOHNSON
SURGICAL VISION, INC.,

Plaintiffs and
Counterclaim
Defendants.

C.A. No. 20-842-CFC-JLH

**DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' SECOND
AMENDED COMPLAINT UNDER RULE 12(B)(6)**

Defendants and Counterclaim Plaintiffs Alcon Vision, LLC, Alcon Laboratories, Inc., and Alcon Research, LLC (collectively, “Alcon”) respectfully move to dismiss Plaintiffs and Counterclaim Defendants Johnson & Johnson Surgical Vision, Inc., AMO Development, LLC, AMO Manufacturing USA, LLC, and AMO Sales and Service, Inc.’s (collectively, “J&J”) Second Amended Complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Alcon states as follows for its motion:

1. On October 19, 2020, Alcon moved to dismiss J&J’s First Amended Complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). *See* D.I. 20, 21. J&J responded on November 2, 2020. *See* D.I. 28. Alcon submitted a reply on November 9, 2020. *See* D.I. 29.

2. On March 3, 2021, Alcon submitted a notice withdrawing its request to dismiss J&J’s induced infringement claims based on information located during discovery. *See* D.I. 68. J&J responded on March 10, 2021. *See* D.I. 77. Alcon replied on March 12, 2021. *See* D.I. 87.

3. On June 16, 2021, the parties stipulated that J&J could file a second amended complaint to assert additional copyright infringement claims and include the additional evidence referred to in Alcon’s notice (D.I. 68) of Alcon’s pre-suit knowledge of certain asserted patents. *See* D.I. 139 at 2. On June 17, 2021, the Court granted J&J leave to file a second amended complaint, D.I. 140. J&J filed its Second Amended Complaint the same day. D.I. 141.

4. J&J's Second Amended Complaint pleaded patent infringement and copyright claims that are nearly identical to the claims in its First Amended Complaint. *Compare* D.I. 141 *with* D.I. 16. J&J's Second Amended Complaint included three substantive changes:

- a. J&J added new copyright infringement claims based on its Confidential FDA Submissions, Internal Technical Documentation, and IntraLase Operator's Manual. *See* D.I. 139 at 2; D.I. 141 ¶¶ 51–54, 72–75, 112–117, Counts XIX, XX.
- b. J&J added new allegations regarding Alcon's pre-suit knowledge of certain asserted patents. *See* D.I. 139 at 2; D.I. 141, ¶¶ 92–94.
- c. J&J withdrew its claims of infringement under 35 U.S.C. § 271(f)(1) and 271(f)(2) for U.S. Patent No. 8,709,001 ("the '001 Patent"). *See* D.I. 139-3 at 93-95.

5. Aside from the aforementioned substantive changes to J&J's Second Amended Complaint, the substance of J&J's infringement claims against Alcon remain the same and the only changes are to the paragraph numbers for each argument.

6. Alcon accordingly moves to dismiss the claims in J&J's Second Amended Complaint for contributory infringement under 35 U.S.C. § 271(c),

infringement under 35 U.S.C. §§ 271(f)(1)-(2), and enhanced damages under § 284 based on willful infringement.

7. The grounds for this Motion against the First Amended Complaint were set forth in Defendants' Opening Brief in Support of Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint under Rule 12(b)(6), as revised by Alcon's subsequent notice. *See* D.I. 21; D.I. 68; D.I. 87.

8. Because J&J's Second Amended Complaint includes new paragraph numbers and drops its § 271(f) allegations against the '001 Patent, Alcon submits an updated Brief in Support of this Motion. Aside from updating citations to certain numbered paragraphs in the First Amended Complaint to the corresponding numbered paragraphs in the Second Amended Complaint and dropping arguments related to induced infringement, there are no substantive changes as compared to Defendants' prior brief.

9. For the Court's convenience, Alcon has included a redline of Defendants' Opening Brief in Support of Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint under Rule 12(b)(6) compared to Defendants' Opening Brief in Support of Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint under Rule 12(b)(6) (D.I. 21).

NOW, THEREFORE, Alcon respectfully requests the Court to grant this motion and to enter the attached order dismissing J&J's claims.

OF COUNSEL:

Jeanne M. Heffernan
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
(212) 446-4800

Gregg F. LoCascio
Noah S. Frank
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 389-5000

Caroline Lourgou
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
(312) 862-2000

Kristen P.L. Reichenbach
KIRKLAND & ELLIS LLP
555 California Street
San Francisco, CA 94104
(415) 439-1400

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/s/ John W. Shaw

John W. Shaw (No. 3362)
Karen E. Keller (No. 4489)
SHAW KELLER LLP
I.M. Pei Building
1105 North Market Street, 12th Floor
Wilmington, DE 19801
(302) 298-0700
jshaw@shawkeller.com
kkeller@shawkeller.com

*Attorneys for Alcon Inc.,
Alcon Vision, LLC,
Alcon Laboratories, Inc. and
Alcon Research, LLC*